

**Order below Exhibit No.27 in R.C.S. No.67/2018**  
**(CNR No. : MHDH06-001278-2018)**

The present application moved by plaintiffs to restore the suit against defendant No.8 which was dismissed for want of steps by plaintiffs after summons returned unserved.

2. Perused the application. The suit is proceeded without written statements of other defendants and they have not filed say to this application, therefore, this application proceeded without their say. Heard Ld. Advocate Shri. B.Z. Marathe for the plaintiffs.

3. It is contentions of the plaintiffs that the present matter is fixed on 29/02/2020 for steps. However, due to COVID-19 situation plaintiffs and their Ld. Advocate could not remain present before the Court and therefore, plaintiffs could not take steps to reissue summons to defendant No.8. It is further contended that the present suit is filed for maintenance, partition and separate possession in respect of immovable properties. Therefore, it is necessary to restore the suit against defendant No.8. If, the suit is not restored it will cause great irreparable loss to them. It is further submitted that they have not intentionally avoided taking steps. On these grounds they have prayed for restore the suit against defendant No.8.

4. It is submitted by Ld. Advocate for the plaintiffs that the provisions the Code of Civil Procedure are directory and not mandatory. The said provisions are made for render justice. It is further submitted that the suit is for maintenance, partition and separate possession and therefore, plaintiffs and all defendants are plaintiff as well as defendants and therefore, to avoid multiplicity of the suit the present suit required to be restored.

5. Provision in respect of appearance of the party and consequences of non appearing of parties are laid down under Order 9 of Code of Civil Procedure. Under Order 9 Rule 2 of Code of Civil Procedure if summons not served where plaintiff failed to pay the charge or cost of

the summons, Court may dismiss the suit. As per Order 9 Rule 3 where neither party appears when the suit is called for hearing, the Court may make an order that the suit be dismissed. On these both grounds if the Court dismissed the suit there is remedy provided under Rule 4 of Order 9 of Code of Civil Procedure. On sufficient cause shown by plaintiff Court may restore the suit which dismissed under Rule 2 or Rule 3 of Order 9 of Code of Civil Procedure. There is another option is that plaintiff may bring fresh suit.

6. Rule 5 of Order 9 of Code of Civil Procedure provides the provision where the suit is dismissed for the reason that plaintiff failed to apply for fresh summons within 7 days after summons returned unserved. If the suit is dismissed under this rule there is remedy provided under sub rule 2 of this rule. As per said sub rule in such case plaintiff may bring a fresh suit. Under this rule the remedy of restoration of the suit is not provided. The only remedy is that plaintiff may bring a fresh suit.

7. It is submitted by Ld. Advocate for plaintiffs that the present suit is filed for maintenance, partition and separate possession and therefore, to avoid the multiplicity of the suit the present suit required to be restored. It is further submitted that the analogy provided under Rule 4 of Order 9 can be applied to restore this suit. No doubt in partition suit all parties are plaintiff as well as defendants. If the plaintiff brought fresh suit against only defendant No.8, definitely it will cause multiplicity of the suit and also technicality it is difficult to bring the partition suit against sole defendant No.8. Therefore, it appears that to avoid multiplicity of the suit, this suit can be restored.

8. It is observed by the Hon'ble Bombay High Court in the recent judgment in case of Hariba Tatyaba More Vs. Dada Eknath More, reported in 2019 JC (Bom) 1767, that a suit dismissed under sub Rule 1 of Rule 5 of Order 9 of Code of Civil Procedure, then inherent power can be used under section 151 of Code of Civil Procedure to restore it. It means

by exercising the inherent power under section 151 of Code of Civil Procedure the suit can be restored which dismissed under Rule 5 of Code of Civil Procedure. Hence, for the aforesaid discussed aspect, it appears that to avoid multiplicity of the suit and in the interest of justice present application deserves to be allowed. Hence, I proceed to pass the following order.

**ORDER**

Application Exh.27 is hereby allowed as prayed and the suit is hereby restored against defendant No.8 and plaintiffs shall take effective steps in this regard, without fail.

Date :- 28/03/2022

(S. L. Vaidya)  
Judicial Magistrate (F.C.),  
Shindkheda Dist. Dhule.

-: CERTIFICATE :-

I certify that the contents of this PDF File are word to word as per Original Judgment / Order.

Name of the Steno : N.C. More,

Name of the Court : Court of J.M.F.C., Shindkheda Dist. Dhule.

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